

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:

WYMAN GORDAN TRU-FORM,

Employer,

and

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS UNION, AFL-CIO-CLC

Petitioner.

Case No. 4-RC-126196

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**PETITIONER UNION'S BRIEF ANSWERING  
EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT  
AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION**

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## **INTRODUCTION**

Hearing Officer Donna M. Bernini-Martin recommended overruling the objections of Wyman Gordon Tru-Form (“Tru-Form” or “Company”) to the May 21, 2014, representation election won by Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (“Union”). The Company has filed exceptions to the Hearing Officer’s Report and Recommendations and asks that the election be voided and re-run. However, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Safeway, Inc.*, 338 N.L.R.B. 525, 525 (2002) (quotation omitted). Additionally, there is a heightened burden where the allegedly threatening or coercive behavior was made by third parties who are not agents of the Union. *Corner Furniture Discount Ctr., Inc.*, 339 N.L.R.B. 1122, 1123 (2003). Although the Company complained of a number of instances of harsh language, the hearing officer correctly concluded that no Tru-Form employees were agents of the Union and that none of the incidents at issue were objectionable. Simply put, she rightly found that the Company failed to meet its heavy burden to justify setting the election aside.

The hearing officer found that the Company’s witnesses greatly exaggerated in testifying to the intimidating effect of the conduct by Union representatives and third parties. A hearing officer’s credibility determinations are afforded deference on review.<sup>1</sup> *Independence Residences, Inc.*, 355 N.L.R.B. 724, 724 n.1 (2010), citing *Stretch-Tex Co.*, 118 N.L.R.B. 1359, 1361 (1957). The Company’s witnesses attended Union meetings and were met with sincere attempts to answer every question that was asked. At no time were they asked to leave a meeting or not to

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<sup>1</sup> The Company’s exceptions explicitly and implicitly challenging the hearing officer’s credibility findings are without merit because her findings are amply supported by the record.

ask questions. On the contrary, Union representatives stayed after meetings to answer any and all questions and invited these employees to attend additional Union meetings.

Furthermore, there were no threats of physical harm, no credible threats of job reprisals,<sup>2</sup> no damage to employees' property, and none of any other type of behavior that might constitute grounds for setting aside an election. The Company points out that the election was close, but more than a small margin is necessary to overturn an election.

The Board should dismiss the Company's exceptions and order that the Union be certified as the collective bargaining representative of the unit.

### **FACTS**

The following summary of the facts draws on the hearing officer's findings and undisputed testimony. The Union filed a petition to represent the employees at Tru-Form's facility on April 9, 2014. Board Ex. 1. On April 22, the Company and the Union arrived at a stipulated agreement defining election procedures and which employees could vote in the May 21 election. *Id.* In negotiating the stipulation, the Company maintained that four individuals ought to be excluded from the bargaining unit because, the Company stated, they were supervisors under the Act, and the Union agreed to exclude these individuals from the unit. Tr. 50-51.

#### **I. Smoke-break discussion between Nethercott, Schaeffer, and Eppley**

William Eppley, a Tru-Form employee, conversed with Craig Schaeffer and Rodney Nethercott, two other employees, while smoking outside in early April 2014. Tr. 25. Employees commonly congregated on smoke breaks, and it was not unusual for Eppley and Nethercott to

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<sup>2</sup> The Company argues that one piece of graffiti, written by an unknown individual, threatened the job of an employee known to be against the Union. This is not a meaning that a reasonable individual would attribute to that graffiti, but even if it were, Board holds threats from rank-and-file employees that individuals not supporting a union would lose their jobs to be non-objectionable because of the inability of such rank-and-file employees to carry out such threats. *Accubuilt*, 340 N.L.R.B. 1337, 1337 (2003).

smoke and talk. Tr. 37. Schaeffer and Nethercott told Eppley to be sure not to make the same mistake he had made “last time” – several years ago, a different union had attempted to organize the facility, and Eppley had been a vocal opponent – or he would be an “outcast.” Tr. 27. Eppley believed that these employees would refuse to speak to him if he opposed the Union’s organizing efforts. Tr. 28-31. Eppley did not testify that Nethercott or Schaeffer uttered any physical threats or menaced him in any way. On the contrary, Eppley said that they made no effort to prevent him from leaving the area. Tr. 42.

## **II. Eppley leads employees to believe he supported the Union**

Over the course of the Union’s election effort, Eppley admits, he campaigned to mislead his co-workers into believing that he supported the Union. Tr. 40. Among others, he spoke to Nethercott and “let him believe” that Eppley supported the Union. Tr. 34. Eppley also testified that he talked with Jeffrey “Jeff” Weaver and got him to believe that Eppley favored the Union. Tr. 40, 185. Weaver testified that, after several conversations, he was left with no doubt Eppley was fully in support of the Union. Tr. 137. Weaver, Eppley, and other employees went out for friendly beers and wings at a bar known as Whiskey Business and talked about organizing. Tr. 138, 146. Eppley said he regretted not voting yes in the previous union election. Tr. 138. Eppley subsequently left work on medical leave on April 24. Tr. 37.

## **III. Weaver and Nethercott text to encourage their friend Eppley to vote**

Eppley was not scheduled to return to work until after the May 21 election. Tr. 38. Two of his co-workers, whom Eppley had convinced that he was a Union supporter, reached out to encourage him to vote in the election. On May 20, Nethercott texted Eppley. This was “not completely unusual,” Eppley testified, as they had texted or spoken by phone previously, and Eppley had saved Nethercott’s phone number into his phone’s list of contacts as “Rod

Nethercott.” Tr. 38-39; Company Ex. 2. Nethercott’s first text read “Get ur ass in here tomortow,” apparently in reference to the election the next day, and his second, sent two minutes later, asked “How u doing.” Company Ex. 2. Two minutes later, Eppley responded “Good!” *Id.*

Eppley also received at least two texts from Weaver while he was out of work, but the hearing focused on one particular text message.<sup>3</sup> Tr. 139-140. The Company did not introduce any texts from Weaver into evidence, but it is undisputed that Weaver advised Eppley of the time and date of the election. Tr. 40, Tr. 138. Weaver recalls that the rest of the text read “rock the vote unless you’re voting no, ha ha.” Tr. 138. Eppley testified that the remainder of the text said “better get your ass in here to vote tomorrow, that is unless, of course, you are a no vote.” Tr. 35. Eppley could not remember whether the text ended with the phrase “ha ha” but conceded “it may have.” Tr. 41. Eppley admitted that if the text had included the phrase “ha ha,” that would have indicated to him that the text was not a threat but a joke or a sarcastic remark. *Id.*

The hearing officer concluded that the evidence established that Nethercott and Weaver sent these texts because they “had reason to believe he was a like-minded Union supporter, and were encouraging him to come in from his medical leave to vote.” Report, p. 8.

#### **IV. Antosh, Mewhort, and others meet with Union organizers**

Sometime during the week of April 21, employees on the third shift, which runs from 10 p.m. to 6 a.m., went to meet with the Union’s organizers after they finished work. Tr. 62, 149-150, 188. This unscheduled meeting occurred at the hotel where Union organizers James “Jim” Gladysz and Charles “Chuck” Meredith were staying. Tr. 150. Meredith and Gladysz were present throughout the meeting, as were Joshua Antosh, Adam Mewhort, Russell Finch, and Kerry Lauer. Tr. 49. Charles “Chuck” Pahler attended the beginning of the meeting and actually

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<sup>3</sup> Weaver testified, with the aid of cell phone records produced by the Company, that he texted Eppley on May 19 and May 20. Tr. 139-140.



gave Mewhort, who is unable to drive, a ride, but Pahler left to pick up his wife after a short time. Tr. 52, 73, 162.

Meredith testified that he did not know any of the individuals who attended the meeting. Tr. 150. Gladys knew Mewhort and Antosh because they had attended a union meeting in March. Tr. 162. Meredith primarily spoke with Antosh, and Gladysz primarily spoke with Mewhort. Tr. 52, 103, 151-152, 163. Finch and Lauer were with Antosh, speaking to Meredith. Tr. 64. The hearing officer credited the third-shift employees' accounts of what was said in this meeting, but, importantly, she specifically found that they "exaggerated the surrounding circumstances and degree to which they were intimidated in order to make the statements by Meredith and Gladysz appear more threatening." Report, p. 11. She noted it was "not plausible" that they were intimidated by the statements "yet stayed at the meeting and continued to ask questions for which they received answers." Report, p. 12.

At the meeting, Antosh asked why the Union had stipulated to exclude four individuals after the Company had objected that they were supervisors. Tr. 50-52, 78, 98, 154. Antosh and Meredith talked about the legal criteria that made someone a supervisor. Tr. 52, 78, 98, 153-154. After Meredith listed these criteria, Antosh then said that he performed some of the functions Meredith identified as making someone a supervisor. Tr. 52, 66-67, 78, 98. Antosh testified "I said, okay, I said, well, for that instance, myself, I have done some of them things along with 20 other people, as an example, have been in the position that they have to be classified as supervisors that these same individuals would have been classified as." Tr. 52. Meredith's response was "well, if you want me to contest your vote, I'll contest your vote." Tr. 53.

At some point in the discussion, Antosh told Meredith he would never vote for the Union. Tr. 156. In response, Meredith asked why Antosh was wasting Meredith's time with his

questions if he was certain not to vote for the Union. Tr. 99, 156. It is undisputed that the conversation continued after this and that Meredith kept answering Antosh's questions until Antosh said he needed to leave. Tr. 64, 156, 166.

Also at this meeting, Gladysz and Mewhort had a discussion about what having a union in the workplace might mean. They discussed how a Union worked in terms of dues, negotiations, and dealing with co-workers. Tr. 104, 163-164. Mewhort related that he had previously been in a union facility and did not like it. Tr. 163-164. Mewhort found Gladysz "very calm, very level-headed throughout" their conversation. Tr. 103.

Mewhort asked something along the lines of "if you had a problem with somebody on the shop floor and you felt the union wasn't taking care of it or whatnot, could I just go to a supervisor and tell them like I do now?" Tr. 104, 165. The hearing officer credited Mewhort's testimony that Gladysz responded that if someone were to go directly to the supervisor, "the guys will consider you a rat. I can't tell you exactly how people are going to treat a rat, but it's a rat." Tr. 104. After Antosh and the others left, Mewhort remained and continued to speak with Meredith and Gladysz. Tr. 128, 166-167. When his wife came to pick him up, he thanked Meredith and Gladysz for speaking with him. Tr. 167.

In all, the meeting lasted almost two hours. Tr. 166. It is undisputed that neither of the Union's organizers told any of the third-shift employees to leave and that they attempted to answer the employees' questions. Tr. 64, 126, 156-157, 165. As the hearing officer summarized, "Mewhort and Antosh admitted that the Union representatives answered their questions even after the above statements were made, never told them to leave the meeting, and told the employees when the next Union meeting would take place." Report, p. 9.

## **V. Mewhort attends the April 27th Union meeting**

Despite what he later characterized as intimidating remarks by Union organizers at the morning meeting at the hotel, Mewhort decided to attend the Union meeting the following Sunday, April 27, which they had informed him about. Tr. 104-105. This meeting was held at the Union hall and attended by a large number of employees from different shifts. Tr. 105-106. Gladysz and David “Dave” Moore, a Union officer at a nearby Company facility, led the meeting. Tr. 168. Mewhort arrived significantly after the start time; by his own estimation, he was about forty-five minutes late. Tr. 121-122.

Mewhort testified that he asked a number of questions during the meeting and that Gladysz and Moore, the local Union president at another Wyman Gordon facility, attempted to answer all of them. Tr. 123-124. Mewhort testified that they never refused to answer his questions, Tr. 123, but he did say that Moore loudly interrupted his first question to ask who he was. Tr. 106. The hearing officer credited Mewhort’s testimony that Moore asked this question but specifically discredited Mewhort’s statements that Moore thereby intimidated him as “exaggerated.” Report, p. 14.

Mewhort recalled that he, Moore, and Gladysz engaged in a long and detailed discussion. Tr. 124-125. The Union representatives even stayed after the meeting had ended to answer Mewhort’s questions. Tr. 124, 170, 181. Moore showed Mewhort a copy of his pay stub to show his Union dues. Tr. 124, 171. Moore went through the contract at his facility with Mewhort to illustrate his points. Tr. 124, 171. This extended conversation lasted about an hour or ninety minutes after the end of the original meeting. Tr. 171. Neither Moore nor Gladysz refused to answer any of Mewhort’s questions or ever asked Mewhort to leave. Tr. 125, 170, 180, 182.

## **VI. Pahler makes comments to Mewhort**

At work the evening of the April 27 meeting, Mewhort spoke with Pahler and asked him about Moore. Tr. 108. Pahler allegedly responded that Mewhort should not have come to the meeting if he was going to be a no vote and should not have brought his anti-union stuff to the meeting. *Id.* He said, Mewhort recalled, that Mewhort was lucky Moore had not thrown him out. Tr. 109. Pahler also allegedly admonished Mewhort for talking about meetings with people who weren't there. Tr. 108.

Mewhort reported that Pahler made other comments on other occasions. Once, Pahler told Mewhort not to talk with Antosh, referring to Antosh as “an anti-union fuck.” Tr. 109. In another incident, Mewhort approached Pahler to talk about some comment Meredith had made about how Union organizers are compensated, and Pahler told him “it doesn't matter, we're up by nine; it doesn't matter what he said.” Tr. 117-118. Mewhort was very clear on the point that Pahler neither told Mewhort not to vote nor said that Mewhort's vote did not matter.<sup>4</sup> Tr. 120-121.

Mewhort said that Pahler had made comments to him about union presidents and officials being paid and that, as a result of these conversations, he believed that Pahler aspired to attain such a position. Tr. 110. Mewhort specifically testified that he was not aware whether Pahler handed out Union cards or distributed Union literature. Tr. 133. He said that Pahler never told him that the Union had instructed him to make any of the statements Mewhort reported. Tr. 133. Pahler did not run for Union office in the Union election after the May 21 representation vote, and he does not serve as a grievance person. Tr. 183. The Union representatives testified,

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<sup>4</sup> Mewhort also testified that he asked other employees what their thoughts were about the election. Tr. 116. He said that they replied that “it didn't really matter, that the guys who were pro-union already had it locked up.” Tr. 116. The hearing officer erred in attributing those employees' belief to conversations between those employees and Pahler. Report, p. 16. Mewhort's testimony did not give any information as to how those three employees arrived at that assessment. Tr. 116-117

without contradiction, that they did not designate Pahler as a contact person and that they alone ran the organizing campaign. Tr. 172, 175, 183.

## **VII. Pro- and anti-Union graffiti is scrawled in one bathroom**

During the pre-election period, one of at least two men's bathrooms at the facility contained a number of different items of graffiti. Tr. 87. Some of the obscene and offensive graffiti was ostensibly supportive of the Union, while some of it appeared to oppose Union representation. Tr. 68, 72, 85, 110-111. Some of the graffiti referred to Antosh and supervisors specifically. The only documented piece of graffiti said "Sshh Daddy will fix it Josh."<sup>5</sup> Employer Ex. 3. Several witnesses testified that one said something to the effect of "Don't worry, Daddy will get you another job." Tr. 55, 81, 111. Another piece of graffiti is said to have been "Antosh = a mouthful of Brink and ass full of Troutman."<sup>6</sup> Tr. 55, 81. A third item said "Antosh likes CO<sup>7</sup> sperm." Tr. 55, 111. No other bargaining unit employee was mentioned by name in the graffiti. Tr. 57. The identity of the creators of any of the graffiti was not known by any of the witnesses who testified on the subject. Tr. 59, 68, 111-113. The Company cleaned up some of the graffiti at least once, but at least one of the unknown perpetrators wrote more obscenities in the handicapped stall. Tr. 111.

## **VIII. The Union wins with 98% turnout**

The election was held May 21, 2014, and 46 out of 47 bargaining unit employees cast ballots. Board Ex. 1. This is a voter turnout rate of almost 98%. The Union won with a margin of two votes – 24 to 22. *Id.* After the Union won the election, Tru-Form employees held a meeting to elect union officers. Tr. 182-183.

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<sup>5</sup> Joshua "Josh" Antosh's father is a supervisor at a different Wyman Gordon facility. Tr. 68, 71.

<sup>6</sup> "Brink" and "Troutman" are the surnames of Tru-Form managers. Tr. 55.

<sup>7</sup> Presumably "Company."

## **ARGUMENT**

The Company's exceptions are entirely meritless. The hearing officers credibility determinations are clearly supported by the evidence and should not be reversed. *Independence Residences*, 355 N.L.R.B. at 724 n.1. None of the Union representatives' conduct had any tendency to interfere with employees' exercise of free choice. *Trump Plaza Hotel and Casino*, 352 N.L.R.B. 628, 629 (2008). Furthermore, no conduct by any third party created a general atmosphere of fear and reprisal such that a free election was not possible. *Westwood Horizons Hotel*, 270 N.L.R.B. 802, 803 (1984). Accordingly, the Board should adopt the Hearing Officer's Report and Recommendations and certify the Union as representative of the employees in the bargaining unit.

### **I. No objectionable conduct was directed at Eppley**

None of Weaver, Schaffer, and Nethercott's statements to Eppley were objectionable, so this conduct cannot possibly form the basis for overturning the election. The Employer did not except from the hearing officer's determination that Weaver, Schaffer, and Nethercott were not agents of the Union, Report, p. 7, effectively conceding that their actions must be viewed as third-party conduct. Actions by third parties may necessitate that an election be re-run only if the conduct is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 N.L.R.B. at 803.<sup>8</sup> The Board uses an objective standard and asks whether a statement could reasonably be interpreted by an employee as a threat. *Avante at Boca Raton, Inc.*, 325 N.L.R.B. 555, 560 (1997). In the circumstances, as

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<sup>8</sup> The Board uses several factors in assessing the seriousness of third-party threats. *Westwood Horizons*, 270 N.L.R.B. at 803. These are (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of the person's capability of carrying it out; and (5) whether the threat was rejuvenated at or near the time of the election. *Id.* No analysis of these factors is necessary here, where there were no threats.

the hearing officer concluded,<sup>9</sup> no reasonable employee could have interpreted Weaver, Schaffer, and Nethercott's words as improper threats.

**a. Refusing to associate with a co-worker is not objectionable**

Employees' decisions not to associate with others because of their sentiment about a union may never form the basis of an election objection. "Silent treatment" of employees because of perceived opposition to the Union "is not objectionable." *Corner Furniture*, 339 N.L.R.B. at 1124 n.6. Shunning people with opposing views "is no more than the human activities of employees involved in a campaign, on a personal basis, and does not rise to the level of objectionable conduct. Rather, it expresses the natural desire for people to associate with others of like mind." *United Builders Supply Co., Inc.*, 287 N.L.R.B. 1364, 1370 (1988). The alleged "threats" by Nethercott and Schaeffer to shun Eppley thus cannot be objectionable. It simply does not matter whether Eppley or other employees had been ostracized in connection with prior Union drives.

Similarly, it is not objectionable for two employees to stand nearby another while conversing with him. This is true even if, as Eppley asserted, these two employees had larger builds. Tr. 26. As the hearing officer noted, Nethercott admitted he would have been able to leave if he wanted to and that neither Schaffer nor Nethercott gave any indication they would attempt to prevent him from leaving. Report, p. 8; Tr. 42. There was absolutely nothing coercive or threatening about this entirely ordinary conversation among coworkers.

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<sup>9</sup> The Company excepts to the hearing officer's failure to "address the closeness of the final vote" in connection with her discussion of allegations of misconduct by these employees, Exception 2, and its supporting brief harps on the relatively narrow margin by which the election was decided. *See e.g.*, Employer's Brief at 13, 16, 17, 23. The Company's argument misses a major point, however: no election, regardless of the margin of victory, may be overturned without some misconduct, either by the Union or its agents or by third parties. In the absence of any improper behavior, the margin of victory is entirely irrelevant, and the hearing officer did not need to discuss it.

**b. No reasonable person in Eppley's position could have felt threatened by the text messages he received**

The text messages Eppley received from Weaver and Nethercott were permissible campaign activity. It is not unlawful for employees to campaign for a union and to encourage union supporters to vote. The texts themselves contain no explicitly or implicitly threatening content. They do not state or imply that the employees or the Union would take any action to stop Eppley from voting or to retaliate against him for voting against the Union or for choosing not to vote.

The innocuous statements in the text messages are rendered even less threatening, if such an outcome is possible, by the context in which Eppley received them. Most important, Eppley knew that he had convinced Nethercott and Weaver that he would be voting for the Union. Tr. 34, 40. A reasonable person in Eppley's position, knowing that Weaver and Nethercott would not see any need to convince or threaten him, would not perceive any threat from these texts. This is particularly true in view of the inclusion of the phrase "ha ha" in Weaver's text to Eppley, Tr. 41, 138, which Eppley admitted would indicate to him that the sender intended the message sarcastically or as a joke. Tr. 41. The unthreatening nature of Nethercott's text is further underscored by Nethercott's second message, which asked how Eppley was doing, and Eppley's enthusiastic response, "Good!" Company Ex. 2.

**II. The graffiti contained no objectionable threats**

The writing on the bathroom walls was insulting and lewd, but it did not come close to creating a general atmosphere of fear and reprisal. *Westwood Horizons Hotel*, 270 N.L.R.B. at 803. The bathroom contained both pro-Union and anti-Union graffiti. Tr. 68, 72, 85, 110-111. In the absence of any evidence about the identity of the graffiti writers, the hearing officer



correctly refused to attribute any of the graffiti statements to the Union or its agents. Report, p. 12.

Simple foul language and name-calling, without implied threats, are not objectionable. *See Emerson Elec. Co.*, 247 N.L.R.B. 1365, 1374 (1980) (holding that “verbal abuse among employees, absent threats does not constitute objectionable conduct”). Likewise, graffiti that merely singles out a particular individual for abuse is not objectionable. *Id.* at 1374, 1376 n.22. The Board recognizes that “a certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election.” *Cal-West Periodicals, Inc.*, 330 N.L.R.B. 599, 600 (2000) (quotation omitted). In this case, there was a great deal of discussion among employees at the plant about the election, and, as the graffiti in the bathroom illustrates, employees for and against the Union used improper language. Tr. 68, 72, 85, 110-11, 129. But none of the insulting graffiti and obscene remarks contained any threats against Antosh or any other person. Most crucially, there were absolutely no threats of violence. Because of this, the graffiti is not objectionable.

The Company contends that the graffiti that said “don’t worry, Daddy will find you another job” was an implied threat that Antosh would lose his job for not supporting the Union. Even if this isolated, ambiguous statement were a threat against Antosh’s employment, the Board has generally held to be non-objectionable threats from rank-and-file employees that individuals not supporting a union would lose their jobs. *Accubuilt*, 340 N.L.R.B. 1337, 1337 (2003) (observing that “such statements can be readily evaluated by employees as being beyond the control of the employees and the union”); *Duralam, Inc.*, 284 N.L.R.B. 1419, 1428 n.2 (1987). But this message is not even clearly a threat that Antosh would lose his job for not supporting the Union. A reading that is somewhat more plausible, in view of the obvious inability of the

unknown employee writing on the bathroom wall to affect the Company's termination decisions, would be that employees who favored the Union would ostracize Antosh to such a degree that he would ask his father to find him a different position at the facility where his father was a supervisor. Such ostracism would be entirely permissible. *See United Builders Supply*, 287 N.L.R.B. at 1370.

The weakness of the Company's case is underscored by the decisions it cites in support of its argument that the graffiti justifies overturning the election, none of which overturned an election on the basis of graffiti that, arguably, threatened an employee's job. Brief, p. 20-21. Instead, the Company relies on cases in which a union agent threatened employees' jobs based on non-payment of dues, *Lyon's Restaurants*, 234 N.L.R.B. 178, 179 (1978); in which anonymous callers threatened physical violence on specific employees, *Cedars-Sinai Med. Ctr.*, 342 N.L.R.B. 596, 597-598 (2004); and in which (1) supervisors threatened job reprisals and physical harm to employees, (2) a threatened employee's car was vandalized, and (3) bathroom graffiti threatened physical harm to specific employees. *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 532 (9th Cir. 1986). This evidence in this proceeding obviously paints an entirely different picture. Although the Company would prefer to have the election overturned on the basis of insulting and obscene graffiti, such a result is inconsistent with Board precedent. *Cf. Accubuilt*, 340 N.L.R.B. at 1337; *Emerson Elec. Co.*, 247 N.L.R.B. at 1374.

### **III. Pahler made no objectionable statements and was not an agent of the Union**

The Company attempts to find fault with a number of statements by employee Pahler, but none of them are objectionable. As for the allegation that he told Mewhort not to speak with Antosh about the Union because he was an "anti-union fuck," insults and name-calling are not objectionable if they are unaccompanied by threats. *See Emerson Elec. Co.*, 247 N.L.R.B. at

1374 (1980). There was no threat, and employees are free to avoid (and to advocate that others avoid) individuals with whom they disagree. *See United Builders Supply*, 287 N.L.R.B. at 1370. In addition, it is unthreatening and commonplace to predict the outcome of an election or to attempt to count votes, as Pahler is alleged to have done. Tr. 117-118. There was no testimony that Pahler discouraged anyone from casting a ballot.

Finally, Pahler's alleged comments that Mewhort should not attend the meeting if he was not going to support the Union and that he was lucky Moore did not eject him from the meeting were not objectionable threats. The Union would be perfectly justified in excluding individuals known not to support its efforts from its organizing meetings. *See Holiday Inn of Palo Alto-Stanford*, 302 N.L.R.B. 572, 572 (1991). As a result, Pahler's statements that Mewhort should not attend if he was not a supporter or that he could have been ejected cannot have been objectionable threats. Certainly none of his comments rose to the level of creating a "general atmosphere of fear and reprisal." *Westwood Horizons Hotel*, 270 N.L.R.B. at 803.

Although none of Pahler's actions would be objectionable if he were an agent of the Union, it is absolutely clear that Pahler was not such an agent. Mewhort testified he believed that Pahler was an agent of the Union because he inferred that Pahler had some desire to seek Union office in the future, Tr. 110, but such a desire would be entirely irrelevant to the question of Pahler's status as a Union agent.<sup>10</sup> Apparent agency<sup>11</sup> arises from acts of the principal (here, the Union) that a third party reasonably interprets to mean that the purported agent (Pahler, in this telling) was acting on behalf of the principal. *See Horizon Group*, 347 N.L.R.B. 795, 806

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<sup>10</sup> Mewhort also testified that, after the representation election and after the Union elected officers in the unit, Pahler told him that Pahler had been designated the third shift grievance person. Tr. 133. As this conversation concerned a position which Pahler allegedly obtained outside the critical period, it is irrelevant. In any event, Pahler did not hold any position with the Union. Tr. 183.

<sup>11</sup> Only apparent agency is relevant to this discussion, as there is no evidence that Pahler ever had actual authority to act on behalf of the Union. Note also that *Basile v. H & R Block, Inc.*, 761 A.2d 1115 (Pa. 2000), cited in the Company's brief at page 22, addresses the formation of actual agency relationships and is utterly irrelevant to the issue at hand. 761 A.2d at 1119-1120.

(2006). But, for two reasons, Pahler could not have been an apparent agent of the Union. First, the Union did not engage in any acts cloaking Pahler in apparent authority, and an apparent agency relationship cannot arise without an act by the principal. *Id.* Second, any belief on Mewhort's part that Pahler's purported desire to hold office in the future made him an agent of the Union in the present would have been patently unreasonable.

#### **IV. The election may not be overturned based on statements at the hotel meeting**

Union organizers Meredith and Gladysz did not make any objectionable statements at their meeting with certain third-shift employees a month before the election. Instead, they gave non-coercive responses to questions by third-shift employees Mewhort and Antosh. In assessing a union's pre-election behavior, the Board asks whether that conduct, viewed objectively, had a reasonable tendency to interfere with employees' exercise of free choice. *Trump Plaza Hotel and Casino*, 352 N.L.R.B. at 629. The hearing officer correctly concluded that nothing said at this meeting had any tendency to interfere with employees' free choice.<sup>12</sup> Report, p. 11-12

##### **a. Meredith was entitled to ask why Antosh was wasting his time**

Meredith's comment about Antosh wasting his time was not in any way coercive. Tr. 156-157. As the hearing officer found, "Antosh admitted that he was not interested in the Union, yet simultaneously requested that the Union provide him with information." Report, p. 12. Meredith reacted to this with bewilderment, as one might expect. Indeed, it seems illogical to continue to ask questions when the answers to those questions will not impact one's behavior. Nonetheless, Meredith did not refuse to provide Antosh with any information because of his lack of support for the Union, and he continued to talk with Antosh after this exchange. Tr. 127, 156-157. But Meredith could have lawfully ended the conversation and refused to give information

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<sup>12</sup> The Company also excepts to the hearing officer's failure to address the closeness of the vote in assessing the statements made by Union representatives at the hotel meeting. Exception 6. As discussed *supra*, the closeness of the vote is irrelevant here, where none of the statements were improper.

to Antosh at any point. In an organizing campaign, the Union has no obligation to provide information to or meet with all employees. *Cf. Holiday Inn of Palo Alto-Stanford*, 302 N.L.R.B. at 572 (holding a union may bar employees who do not support its efforts from organizing meetings).

**b. Antosh told Meredith that he performed supervisory duties, so Meredith could properly ask whether Antosh wanted Meredith to challenge his vote**

Meredith's question whether Antosh wanted Meredith to challenge his vote was not coercive because it immediately followed a statement by Antosh that he performed supervisory duties. The exchange occurred "in the context of a discussion regarding why the Union agreed to exclude certain individuals from the unit." Report, p. 11. Meredith listed several responsibilities that indicate an employee is a supervisor. Tr. 52, 66-67, 78, 98. Antosh then told Meredith that he had performed duties that were among the responsibilities that Meredith had just stated made an employee a supervisor, at which point Meredith asked Antosh if Antosh wanted Meredith to challenge his vote. Tr. 52, 66-67, 78-79, 98. Any reasonable listener would thus have understood that Meredith had a good faith reason, based on Antosh's own representations, to think that Antosh might be a supervisor. Although Meredith may have inferred that Antosh did not consider himself to be a supervisor, Meredith knew, as he told Antosh, that "what you believe a supervisor is and what the Act [says] under supervisors can be two different things." Tr. 153. If the Union had evidence that Antosh was a supervisor, it would be perfectly proper to challenge his ballot. Meredith's comment, therefore, had no tendency to interfere in employees' free choice.

**c. Gladysz's statement expressed a commonplace truth and did not relate to the election**

Neither did Gladysz's comment at the meeting tend to interfere with employees' free choice. Mewhort asked Gladysz whether he could, in a unionized setting, go directly to a supervisor and report a problem with another member of the bargaining unit. Tr. 54, 104. Gladysz told Mewhort that if an employee went directly to management, other employees would think he was a rat. Tr. 54, 104. Gladysz continued by saying that he could not predict how employees would react to a rat. Tr. 54, 104.

Gladysz's statement reflects the reality that co-workers are unlikely to appreciate someone who complains about them to management, regardless of whether there is a union in the workplace. A reasonable listener would interpret Gladysz's alleged statement as predicting that employees might dislike, shun, or insult a "rat."<sup>13</sup> Such conduct, the natural result of humans preferring to associate with others of like mind, is unobjectionable. *See United Builders Supply*, 287 N.L.R.B. at 1370. Notably, Gladysz did not indicate that the Union encouraged these employee perceptions and did not insinuate that the Union would take any action against someone who reported a problem to a supervisor.

In addition, Gladysz's remark was entirely unrelated to the election and so could not be a reason to set it aside. An election may only be overturned if coercive conduct was so related to the election "as to have had a probable effect on the employees' actions at the polls." *Hertz Corp.*, 316 N.L.R.B. 672, 694 (1995); *see also Great Atl. & Pac. Tea Co.*, 177 N.L.R.B. 942, 942 (1969). Gladysz made the statement at issue when Mewhort asked about handling grievances regarding coworkers in a unionized environment. Tr. 104. That some employees would have a problem with someone speaking directly to a supervisor about such grievances

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<sup>13</sup> It is relevant that the prior history of union organizing efforts in the plant included no violence or threats but did include co-workers refusing to associate with certain employees. Tr. 28-29.

lacks even a tenuous connection with how Mewhort would vote in the election. Mewhort testified that Gladysz's statement made him "feel intimidated to the point that . . . I wouldn't be able to do those things, to be considered a rat." Tr. 104-105. His reaction, like any reasonable listener's, did not connect Gladysz's statement to the election but to what he would feel comfortable doing after the election if the Union won. He testified he would have been intimidated from taking concerns directly to management, not from voting one way or the other. Tr. 104-105.

**d. Even if they were objectionable, these comments did not have a reasonable tendency to interfere with employees' free choice**

Even if one were to view a statement at the hotel meeting as a threat related to the election, the *Cedars-Sinai* factors do not favor overturning employees' expressed choice. In determining whether coercive conduct rises to the level necessary to void an election, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among bargaining unit employees; (3) the number of the employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of the dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Cedars-Sinai Med. Ctr.*, 342 N.L.R.B. at 597. Considered together, these factors do not favor overturning the election.

This was a single incident approximately a month prior the May 21 election. Tr. 150. These statements were not threats that the Union would harm people, by violence or job loss; they dealt only with possible election challenges and unknown behavior by third parties. They

were thus supremely unlikely to cause fear among employees, and the hearing officer found that the Company's witnesses were exaggerating when they testified that the Union organizers' statements intimidated them. Report, p. 11. At most four employees were exposed to these remarks, Pahler having left before the meeting got underway.<sup>14</sup> Tr. 151, 162.

There is no evidence that the alleged misconduct particularly persisted in employees' minds. Indeed, the employees continued to speak with Gladysz and Meredith after they allegedly made these statements, and the Union representatives invited the employees to attend a scheduled meeting so that they could ask additional questions. Tr. 104-105, 127, 157. Significantly, Mewhort took them up on their invitation and attended a subsequent Union meeting. Tr. 105. This continued willingness to engage with the Union's allegedly threatening representatives dramatically undercuts the Company's claim that employees were intimidated, as the hearing officer recognized. Report, p. 12.

In addition, there was no evidence that the alleged misconduct was disseminated beyond the four employees present at the meeting.<sup>15</sup> Any misconduct was therefore so limited in scope and removed in time from the election as to not have a reasonable tendency to interfere with employees' exercise of their free choice.

#### **V. Asking someone to identify themselves at a Union meeting is not objectionable**

Adopting the bizarre position that asking an attendee at a Union meeting to identify himself has a tendency to interfere with employees' free choice, the Company has taken exception to the hearing officer's finding that Moore's conduct at a Union meeting was not objectionable.

Exception 8. Mewhort testified that he arrived about forty-five minutes late for a meeting at the

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<sup>14</sup> There is no evidence that Finch and Lauer heard Gladysz's alleged statement. Finch did not testify to it, Lauer did not testify at all, and both men were primarily talking with Meredith. Tr. 64.

<sup>15</sup> The hearing officer mistakenly stated that there was evidence of dissemination of the statements at this meeting to two other employees. Report, p. 11. No such evidence is in the record. Mewhort testified that he talked about a different meeting with two other employees. Tr. 108, 131.



Union hall on April 27. Tr. 121-122. Moore, who had never met Mewhort before, allegedly asked who Mewhort was when Mewhort asked a question. Tr. 106-107. Although Mewhort testified this “intimidated” him, the hearing officer found this “implausible” in view of the fact that the “Union representatives stayed at least an hour after the meeting to answer his questions, and provide him with information about the Union.” Report, p. 14.

Setting aside Mewhort’s “exaggerated” testimony regarding the effect of Moore’s question, Report, p. 14, Moore had every right to inquire after Mewhort’s identity. The Board has held that the Union would be perfectly justified in excluding individuals known not to support its efforts from its organizing meetings. *Holiday Inn of Palo Alto-Stanford*, 302 N.L.R.B. at 572 (“[A] union is under no statutory obligation to permit employee-opponents of the union to attend its organizing meetings and thus the union may lawfully bar known or suspected opponents from such meetings.”). The Union’s right to control who attends meetings it holds on its property means that Union must also have the right to try to determine the identity of individuals attending such meetings.

## **CONCLUSION**

In view of all the foregoing, the Company has not met its heavy burden of proof to establish that the election should be set aside. Unlike the many cases to which the Company points, the facts here do not include violence or credible threats. Because none of the statements on which the Company relies were threatening, they could not have cumulated to affect the outcome of the election. Although the election was close, the Company cannot have the election overturned on that basis alone. The hearing officer's recommendations therefore should be adopted and the Union should be certified as the bargaining representative for employees at Wyman Gordon Tru-Form.

Sincerely,

/s/Nathan L. Kilbert

Nathan L. Kilbert  
*Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

I, Nathan Kilbert, hereby certify that on this 29th day of August 2014, a true and correct copy of the foregoing was served upon the following via express mail:

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